Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 2002

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a decision that effectively excludes a new class of plaintiffs from statutory employment coverage as a matter of law merit review by this Court where that decision conflicts with decisions of this Court and at least eleven circuits?

2. Does a decision that effectively creates a new rule of federal civil procedure regarding State preclusive statutes merit review by this Court where that decision conflicts with decisions of this Court and the State's highest court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND JURISDICTION

The Court of Appeals entered its opinion and order on April 3, 2002 ("decision") (1a).[1] A petition for rehearing and rehearing *en banc* was timely filed on April 16, 2002 and denied on June 25, 2002 (12a). This petition was filed within 90 days thereafter. The opinion (per Garaufis, D.J., sitting as circuit judge by designation) is published as *York v. Association of the Bar of the City of New York et al.*, 286 F3d 122 (CA 2, 2002) (1a-11a). The orders denying rehearing and rehearing *en banc* are not published. Jurisdiction is predicated upon 42 U.S.C. §2000e *et seq*. (Civil Rights Act of 1964 Title 7) (Title 7).

STATUTORY PROVISIONS

The relevant statutory provisions are annexed to this Petition and identified in the Table of Appendices above.

STATEMENT OF THE CASE

Parties. The case arises from work Petitioner Alexandra York (York) did for respondent Association of the Bar of the City of New York (Association) from 1989 to 1992 to introduce the Association to what it described as the "brand new field" of international environmental law. A. 12-18, 169-70, 197 n34, 262.[2] York was a dues-paying member of the Association in good standing from 1979 until 1992. A. 169, 261. During all the times in point she was also an assistant attorney general in the environmental bureau of the New York State Department of Law. A. 3-4.

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1. Numbers followed by "a" refer to pages of Petitioner's Appendix annexed to this Petition.

2. Numbers preceded by "A." refer to pages of the Joint Appendix the parties submitted to the Second Circuit.

The Association is a professional membership association for attorneys with over 22,000 members worldwide. A. 5. It is influential in the worlds of law, politics, business and finance, international affairs, and society generally. A. 169, 255. Through its committees, conferences, publications, and official "pronouncements", the Association helps to define and resolve major issues in all of these fields. A. 86, 173 n.10, 219, 255-57. For example, the chief allied counsel at the Nuremberg war crimes trials was a member of the Association. A. 254. The Association also endorses or refuses to endorse candidates for election and judicial appointees. During this litigation two former executive directors of the Association testified that it is "the most prominent" and "most prestigious" bar association in the nation if not the world. A. 255.

During the relevant times the Association performed its work through over 100 committees that addressed subjects from admiralty to zoning and appointed its non-wage workers from among its committee members. A. 255, 260. Committee members were not required to do any work for the Association and most did not. A. 219, 223, 261.

Employment. From 1979 until 1989 York repeatedly declined Association offers to join its committees or work for it because they did not offer opportunity to engage in the international environmental legal practice she sought. A. 200, 261. That field largely did not exist in the United States during that time. A.12-18, 57, 200. In 1989 the Association asked York to develop for it its first international environmental law projects, a subject it had not previously addressed because other members declined to work in that new field. A. 197 n.34, 262. The Association's environment committee members said they were "not interested in international issues," and international committee members said they knew "nothing about the environmental issues" and would "follow [York's] lead." *Id.* From 1989 until 1992 York worked thousands of hours for the Association mostly unassisted to produce its first international environmental projects. A. 12-18, 68, 170, 278. Her work for the Association and the attorney general often approached that of two full-time jobs. A. 278.

York worked for the Association because it promised to compensate her with substantial financial benefits not generally available to other members of the Association, including opportunities to gain salaried work in the new field of international environmental law. A. 269-83. Among other things the Association promised York that in exchange for her developing projects related to the first United Nations Conference on Environment and Development to be held in Rio de Janeiro in June 1992 (Earth Summit), it would seriously consider appointing her to represent it at the Earth Summit. A. 12-18, 29-43 (esp. 40-41), 262-63, 270-78 (esp 274-75). The Earth Summit was a landmark event because it was the largest conference ever convened until that time and has since spawned many related meetings and much legal work. A. 40, 196. York proposed that the Association participate in the Earth Summit and at the request of the Association worked with government agencies to effect that participation. A. 56,169-70, 263. Because environmental committee members had said they were "not interested in the international issues" and international committees had said they knew "nothing about environment,"York originated a new committee on international environmental law (CIEL). A. 14-15, 170 n.5. The Association testified that CIEL enabled it to participate in the Earth Summit and that without York's "visionary" work two years earlier it would not have been able to do so. A. 170.

York proposed that the Association invite five law schools (Harvard, Yale, Columbia, New York University, and the Centre for International Environmental Law at King's College London) to join it in preparing and publishing a discussion of the major issues to be discussed at the Earth Summit. A. 15. She directed that project for the Association for about a year. A. 16, 55, 263-65. She proposed, developed and presented for the Association in its Great Hall its first three international environmental programs regarding environment and economics in developing countries, the Earth Summit, and climate change, respectively. A. 13, 16, 17. Those events included two all-day programs, featured dozens of internationally renowned speakers and were attended by hundreds of people. *Id.* and 271. York's projects for the Association attracted new members who joined it at least in part to participate in new projects she had

created there. A. 272. She helped raise significant amounts for the Association in donor contributions, new member dues, and fees for luncheons she proposed. A. 13, 16-17, 186, 263-264, 269, 271-72.

York also performed for the Association support activities related to her major projects, including fund-raising, supervision of publicity, mailings, catering, editing, clerical support and others. A. 179, 263-64. She believed she must perform those activities in order to be permitted to continue her employment by the Association. A. 277-78. The Association praised York's work for it as "major", "extraordinary", "visionary" and "creative work at a very high professional level" and widely identified York to third parties as its *de facto* director of international environmental projects. A. 12-18, 169-170, 185, 186 n.20, 272.

At all times the Association supervised, directed and "tightly controlled" the work York did for it. A. 4 , 6-7, 12, 264-65. It always had power to terminate York and did so after respondent Kass was named chair of the new committee she had originated and refused to let York do any more work for the Association because she rejected his sexual advances. A. 24, 42, 54-61, 202 n.39, 266. Among other things, Kass refused to name York as an Association delegate or alternate delegate to the Earth Summit, and she did not gain entry to that conference as Association delegates did. A. 41-43, 57-60, 196. After York filed a discrimination complaint against the Association, it discharged her by telling her it would "have nothing further to do with" her because she had done so. A. 22, 54, 63.

Compensation. The Association did not pay York a salary but promised her in exchange for her work, orally and in writing, substantial financial benefits not generally available to other members. A. 196, 269-78. The Association paid all costs for the work York did for it and gave her workspace, reimbursements, clerical and professional assistance, extensive publicity, and opportunities for tax deductions. A. 265, 268(¶121)-270. Those benefits were valuable to York because they enabled her to do work she could not have done otherwise, since the State Attorney General does no international work. A. 283.

York alleged her "most valuable compensation" from the Association was access to specific employment opportunities it controlled in the new field of international environmental law, both within and outside the Association, and promised to make available to her, especially the opportunity to represent it at the Earth Summit. A. 185 n.17, 270-283, esp. 275-77 and 281. Those promises induced York to work for the Association after she had refused to do so for 10 years, and she would not have agreed to work for the Association without them. A. 278. York's work for the Association led directly to full-time paid work in her field, although she had to leave the U.S. to obtain it after the Association defamed her and she was not able to find work in the U.S. A. 282, 90-120 esp.101.

History. In 1992 York tried to file a complaint against the Association and Kass with the U.S. Equal Employment Opportunity Commission (EEOC) but it directed her to file with the New York State Division of Human Rights (DHR). A285. She did so. Her DHR complaint stated she had worked for the Association and it had denied her employment opportunities, but DHR denominated her complaint as one alleging only violations of the state public accommodations law (NY Exec. Law §296[2]). A. 124, 16a. After investigation, DHR amended her complaint to allege employment violations (NY Exec. Law §296[1])(16a), and gave it a dual-filing number with EEOC *nunc pro tunc* to the date of her original complaint to correct DHR's error in identifying her complaint as one alleging only public accommodations violations. A. 126, 128-30, 285-86, 290.

After DHR's 6-year delay in scheduling the hearing, it denied as "time-barred" York's request to amend the complaint before the hearing, as its rules permit, to name respondent French and confirm her employment allegations. A. 287-289. DHR refused to acknowledge its amendment of her complaint to allege employment violations or her dual-filing number with EEOC. A. 286-87, 291. During the DHR hearing the ALJ refused to allow York to argue or present evidence regarding employment, including her own testimony, witnesses, exhibits or rebuttal. A. 286-87, 289. York's post-hearing brief discussed the Title 7 "benefits test" for

employment compensation, but DHR did not acknowledge that federal employment law and dismissed her public accommodation claim. A. 10, 289. Respondents told the district court DHR "did not permit argument that it was employment because they [*sic*] found it was not employment." A. 228.

Upon appeal, EEOC issued a right-to-sue letter. A. 208. The United States District Court for the Southern District of New York dismissed the case for failure to state a claim, without a hearing. A. 311-25. The United States Court of Appeals for the Second Circuit affirmed and denied York's timely petitions for rehearing and rehearing *en banc*. 1a-12a. The Circuit said York could not be the Association's Title 7 employee as a matter of law because she was not compensated and dismissed her state law claims as absolutely barred by NY Exec. Law §§297 (9) and 298 (election of remedies). 17a.

REASONS TO GRANT THE WRIT

1. The Decision Below Merits Review By This Court Because It Conflicts With Decisions Of This Court And At Least Eleven Circuits In Effectively Excluding Members Of A Professional Association As Its Statutory Employees As A Matter Of Law

A. The Legal Tests for Statutory Employment

The decision effectively held that all members of a professional association "volunteer" their work for it as a matter of law and cannot be the association's non-wage employees, because members work to further "the organization and *its* objectives." 8a; 286 F3d at 126 (emphasis added). But this Court has said members of an organization can also be its employees. *Goldberg v. Whitaker House Coop.*, 366 US 28 (1961). Further, where Congress has excluded classes of workers from statutory coverage, new *per se* exclusions are not favored. *Hishon v. King and Spalding*, 467 US 69, 77-78 and n.11 (1984). Congress did not include association members among Title 7 (§ 2000e[b]) exemptions.

This Title 7 case has far-reaching consequences beyond Title 7, (42 USCA 2000e *et seq.*), because interpretations under it, the Fair Labor Standards Act of 1938, 29 USCA sec. 201 *et seq.*, (FLSA), Age Discrimination in Employment Act of 1967, 29 USCA §621 *et. seq.* (ADEA), or Americans with Disabilities Act of 1990, 42 USCA §12101 *et seq.* (ADA) are "persuasive authority" when interpreting the other statutes. (Relevant sections of these statutes are annexed as appendices, 14a-15a.) *See, e.g., Wheeler v. Hurdman*, 825 F2d 257, 263 (CA 10, 1987), cert. denied, 484 U.S. 986 (198); and *United States v. New York State Dept. of Motor Vehicles*, 82 F.Supp.2d 42 (EDNY 2000)(ADA). Until this decision, all U.S. circuit courts have rejected *per se* exclusions from statutory employment except those specified by Congress and required careful fact-finding in each case. *See, e.g., EEOC v. Johnson & Higgins Inc.*, 91 F3d 1529 (CA2, 1996), cert. denied, 522 US 808 (1997), and *Danneskjold v. Hausrath*, 82 F3d 37 (CA2, 1996) and cases cited therein. The decision conflicts with decisions from this Court and at least 11 circuits. If left standing, the decision will create confusion and inconsistency in federal court decisions throughout the nation regarding employment status under these four statutes and increase the burden of federal litigation.

The legal test this Court has prescribed to determine the existence of a statutory employment relationship under anti-discrimination statutes is the common law agency test of control. *Nationwide Mut. Ins. Co. v. Darden*, 503 US 318 (1992); *accord, Frankel v. Bally, Inc.*, 987 F2d 86, 90 (CA 2, 1993). Under this test, the employer has the "right to control the means and manner by which the product is accomplished. *Id. at 323.* Other factors relevant in determining employment status are who supplies the equipment and work location; the length of time the employee has worked; whether the hiring party has the right to assign additional tasks to the worker or control the hours of work; whether employment may be terminated by one or both parties; who controls the hire and pay of assistants; whether the hiring party is in business and the work is an integral part of its business; and the tax treatment of the worker. *Id. at 324.* York's complaint satisfied all these tests. She alleged her supervisors at the Association always "tightly

controlled and directed" the means of producing her work. A. 201-203, esp. 202 n.39, 264-266. The Association gave York workspace, clerical and professional help, paid all her project costs, and specified times for its performance. A. 268-69, 12-18. It had the power to prescribe, when, where, and with whom she should work, and the power to assign additional tasks and terminate her work. *Id.* and 114, 179, 263, 276-78. Her work was "an integral part" of the Association's business, and it paid her with substantial financial benefits. A. 12-18, 268-83. York enjoyed tax deductions for unreimbursed costs of work for the Association. A. 270; *see also*, A. 29-61, 184, 193-94. In light of all these factors, York alleged the Association controlled her work for it sufficiently to satisfy *Darden's* common law agency test for employment. The decision on appeal did not examine any of the elements of control.

Frankel endorses a "non-exhaustive list of factors as part of a flexible analysis of the totality of the circumstances." 987 F2d at 90, citing *Darden.* For example, a membership organization can both give its members the opportunity to work and also pay them. *Goldberg* at 32. The Association gave York the opportunity she did not have elsewhere to create what the Association called a new field of law and paid her with financial benefits not available to other members because they were not initially willing to help create that field. A. 197 n.34. An informal contract of Title 7 employment "may arise by the simple act of handing a job applicant a shovel and providing a workplace." *Hishon* at 74. The Association gave York workspace, staff, publicity and paid her project costs. A. 185, 268-69, 270, 273. Courts also consider the amount of time a worker gives the alleged employer and the permanency of their relationship. *See, e.g., Johnson, 91 F3d at 1539.* Over two and a half years, York worked thousands of hours for the Association mostly unassisted and often nearly full-time. A. 278.

The Second Circuit also asks "whether a worker reports to someone higher in the hierarchy who evaluates performance and ties compensation to performance." *Johnson.* at 1539-40. York was required to report to Association supervisors who evaluated her performance and compensated her with benefits that were tied to

her level of performance there. A. 17-18, 185, 274-277. Because her Association supervisors judged her performance to be "extraordinary" (A. 169), they compensated her with substantial financial benefits described below. A. 170. Statutory employment coverage attaches to a worker who is economically dependent upon the defendant. *Bartels v. Birmingham*, 332 US 126, 130 (1947). Because the new field of international environmental law largely did not exist in the United States in 1989-92, and the Association"controlled access to the only practical route" by which York could obtain salaried employment in that field, she was economically dependent upon the Association. A. 282-283. *Haavistola v. Community Fire Co. of Rising Sun,* 6 F3d 211, 221 (CA4, 1993) (defendant controlled access to only practical route to paramedic certification), cited with by approval by the Second Circuit in *Pietras v. Bd. of Fire Commrs. of the Farmingville Fire Dist.,* 180 F3d 468, 473 (CA 2, 1999) and *O'Connor v. Davis*, 126 F3d 112, 116 (CA2, 1997), cert. denied 118 S.Ct. 1048 (1998). Institutional control of opportunities for advancement in the organization or elsewhere is evidence of economic dependence. *Armbruster v. Quinn,* 711 F2d 1332, 1342 n.9 (CA 6, 1983).

A worker who is economically dependent upon an organization cannot be a "volunteer". *Bartels,* 332 US at 130. Courts must go beyond the "volunteer" label and examine the facts, even against protests from workers and defendants that they never intended employment. *Alamo v. Sec. of Labor,* 471 US 290 (1985). As in *Bartels* and *Alamo,* York depended upon the Association for the opportunity to work in her field. 471 US at 301. As in *Haavistola,* York's employment claims involve "fact-intensive determinations of complex issues" about which the court "was not equipped to rule on the basis of a summary judgment record alone." 6 F3d at 221.

In *Carter v. Dutchess Comm. Coll.*, 735 F2d 8, 14 (CA 2, 1984) the Second Circuit reversed a *per se* exclusion of prison inmates from FLSA coverage and required a "full inquiry into the true economic reality" including facts regarding work and pay schedules, control of workers and other issues. In *Danneskjold* the Second Circuit modified *Carter* to exclude from FLSA coverage inmates

who work only to produce prison items but left open coverage for inmates who work "for commerce" and specifically reaffirmed *Carter*'s rejection of a *per se* exclusionary rule. 82 F3d at 44. In *Johnson* the Second Circuit rejected a *per se* ADEA exclusion for corporate directors and held them to be covered employees. 91 F3d at 1539. The court recognized that directors are "traditionally held not to be employees" but examined the "actual role" played by claimants and ways in which that "actual role" affected with traditional concepts, and found directors had assumed duties of employees for purposes of anti-discrimination laws. *Id.* at 1539-40. Workers should be considered statutory employees regardless of what other role they may play in the organization." *Id.* at 1539. As in *Johnson,* York devoted great time to the Association and was its *de facto* "manager of operations"for international environmental projects. *Idem.* Her "major" projects and support activities for the Association as its manager of operations in that new field of law transformed her legal status at the Association from that of only a member to dual status as a member and also as the Association's statutory employee. *Id.* at 1540; *Goldberg*, 366 US at 32.

The decision skirted all these prescriptions by mis-stating York's argument at the outset. It said she "argues . . . she served . . . in [a] volunteer capacity . . .. " 6a; 286 F3d at 125. But she did not argue that. The Record shows York argued strenuously to both the district and circuit courts that for 10 years she repeatedly rejected offers to"volunteer" unpaid work to the Association and *never* served as a "volunteer" but only in exchange for specific Association promises to compensate her work for it. A. 278-83 esp. 278; 261. By labeling York a "volunteer" in disregard of the Record, the decision reached the legal conclusion it was charged with reaching from the Record. The decision did not discuss York's history of refusing to "volunteer" her work for the Association.

The decision's statement that Association members work to further *its* objectives (8a; 286 F3d at 126) is rebutted by the Record. It indicates Association members join primarily to advance their personal careers rather than Association "objectives." Association membership dues are not tax deductible as charitable contributions

to the Association but may be deductible as a member's *work-related* expenses. A. 280. A member's payment of those dues therefore creates a presumption that dues are paid not primarily to further Association objectives but to secure *personal* benefits for the member. *Id.* York's history of refusing Association offers to work to further "*its* objectives" supports the presumption created by payment of non-deductible dues that she did not join the Association to further *its* objectives and was not willing to "volunteer" her time and skill for "group activities" without individual recompense. A. 261, 278-280. Not until the Association promised York substantial financial benefits in exchange for her work did she agree to work for it . A268(121)-283 esp. 278. The decision did not discuss dues.

Nothing in Title 7 prevents a person who enters an organization as a member or even as a "volunteer" from later being hired as its employee. To the contrary, to dragoon more than twenty-two thousand Association members as "volunteers" as a matter of law violates the statutory purpose of Title 7. Because the statutory goal of Title7 is employment *opportunity,* the statute *favors* the opportunity for a member-worker to be granted its coverage. *Hishon* at 74; *see also Robinson v. Shell Oil Co.*, 519 US 337, 345(1997) (extended Title 7 protection to former employees).

Among the most compelling evidence that the Association employed York is that she "assumed duties that [made her] an employee for purposes of anti-discrimination laws" (*Johnson* at 1539-40) and the Association identified her to hundreds of third parties as its *de facto* director of international environmental projects. A. 12-18, 169-70, 185, 186 n.20. For example, York assisted with and supervised support functions. A. 179, 263, 277-78. The Association contacted all UN foreign missions and introduced York to them as the moderator of its first international environmental program, and advertised that program in various media identifying her as moderator and the person to contact regarding it. A. 13, 15-18, 202 n.40, 262-63, 270-71. Such a position indicates the reciprocal exchange of bargained-for benefits that is the essence of employment. including regular duties and control by the employer. *See, e.g., Graves v. Women's Professional*

Rodeo Assoc., 907 F2d 71,74 (CA 8, 1990). Reciprocal benefits are the heart of Title 7 compensation. *Id.* and A. 283.

DHR recognized York's employment status by amending her complaint to allege employment violations after its fact-finding investigation and by giving her a dual-filing number with EEOC *nunc pro tunc* to the date of filing her original complaint to correct its original error in identifying her complaint as one alleging only public accommodations violations. A. 126, 128, 130, 285-86. EEOC gave York a right-to-sue letter because it too recognized her employment status. A. 210. *Compare Pietras*, 180 F3d at 473-74 (EEOC refused to give plaintiff a right-to-sue letter because "she was not an employee"). The decision did not mention DHR's amendment of York's complaint to allege employment, the EEOC dual-filing number it gave her, or her right-to-sue letter.

By misrepresenting thousands of hours of York's work as "volunteer activity" despite the Record's evidence to the contrary, the decision raises the specter that judgment for York would "render all volunteer activity 'employment'." 8a; 286 F3d at 126. But the Association has identified no other member who rejected its offers to work for it for 10 years and agreed to work for it only when the Association promised that member substantial compensation. Nor has the Association identified any other member whose work rivaled York's in quantity, speed, scope, and vision or who established a mutual economic dependence with the Association by creating a new field for it. A. 282-83. This Court abjures floodgate arguments. *See Alamo*, 471 US at 302-304 and *Brentwood Academy v. Tennessee Sec. School Athletic Assn.*, 531 US 288, 298, 304 (2000).

The right to be fairly considered for employment is protected by the due process and equal protection clauses of the 5th and 14th amendments. *See, e.g., Kremer v. Chemical Constr. Corp.*, 456 US 461,428-433 (1982) and *Logan v. Zimmerman Brush Co.*, 455 US 422, 428-31 (1982). By excluding association members from statutory employment as a matter of law, the decision affords those members less constitutional protection than prisoners. *Compare Carter* and *Danneskjold* (rejected *per se* statutory exclusions for inmates). Title 7 requires fact-specific analysis because its statutory

goal is fairness to individuals, not classes. *Los Angeles Dept. of Water & Power v. Manhart*, 435 US 702, 709 (1978).

B. Compensation

Statutory employment does not require a salary but can arise by payment of benefits in exchange for work. *Alamo*, 471 US at 301. In *Pietras* and *O'Connor*, the Second Circuit endorsed non-wage financial benefits as Title 7 compensation. But the decision directly conflicts with *Alamo*, because the only "financial benefits" it recognizes as Title 7 compensation are benefits customarily tied to salaried employment. 7a; 286 F3d at 126. The decision recognizes only "salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing . . . a retirement pension . . . life insurance . . . death benefits . . . disability insurance . . . and . . . some medical benefits." *Id.* All of these are virtually always incidents of salaried employment. The decision's purported acceptance of them as non-wage benefits is a transparent attempt to avoid the non-wage strictures of *Alamo*.

The decision also conflicts with *Hishon*, because it refused to consider as Title 7 compensation employment opportunities that *Hishon* endorsed and that York alleged were her "most valuable compensation." A. 279, 281. (*N.b.*, York did not "put forward . . . networking opportunities" as compensation, and the Record does not support that untrue statement. *Compare* 7-8a; 286 F3d at 126.) *Hishon* held that a defendant's promise of consideration for a worker's promotion within its organization can be a term of an enforceable contract of Title 7 employment. *Hishon*, 467 US at 74-75. If a promise of consideration for future promotion can be an element of an enforceable contract it is necessarily a substantial remunerative benefit because it causes an employee to accept or continue employment.

As in *Hishon*, 467 US at 71, the Association repeatedly promised York, orally and in writing, consideration for two *ultimate* opportunities: to chair the new committee she had originated and to represent the Association at the first Earth Summit. A. 29-30, 32,

34-43, 181, 270-78. President Harper promised her in writing he would be "happy to consider" her as chair of the new committee who would in turn become the Association's new director of international environmental projects and choose the Earth Summit delegates. A. 275. As in *Hishon,* those promises were "recruiting devices" that induced York to work for the Association. 467 US at 71. York relied upon those promises and would not have worked for the Association without them. A. 278-83 esp. 278; *see* 467 US at 72. The Association also gave and promised York consideration for other promotions within its organization including vice-chair of the new committee she originated, subcommittee chair and others. A. 274-77. Those continuing promises induced her to work for it for two years. A. 185, 193, 199, 203, 278-83.

Hishon involved promise of opportunity *within* the defendant organization but promise of opportunity outside it can be even more financially valuable. At least 10 circuits including the Second Circuit have held that a defendant's control of access to employment opportunities *outside* its organization can establish defendant liability as a Title 7 employer. *See, e.g., Sibley Mem. Hosp. v. Wilson,* 488 F.2d 1338 (DC Cir. 1973); *Carparts Distr. Ctr. v. Automotive Wholesalers,* 373 F3d 12, 18 (CA1, 1994) (ADA claim); *Spirt v. Teachers Ins. and Annuity Assn.*, 691 F2d 1054, 1063 (CA2, 1982), *judgment vacated on other grounds,* 463 US 1223 (1983)(a Title 7 employer may be "any party who significantly affects access of any individual to employment opportunities"); *Charlton v. Paramus Bd. of Ed.*, 25 F3d 194 (CA 3,1994); *Bender v. Suburban Hosp. Inc.,* 159 F3d 186, 188 (CA 4, 1998); *Armbruster v. Quinn*, 711 F2d 1332 (CA6, 1983); *Christopher v. Stouder Mem. Hosp.*, 936 F2d 870 (CA 6, 1991), cert. denied, 112 S.Ct. 658 (1991); *Doe v. St. Joseph Hosp.*, 788 F2d 411 (CA 7, 1986); *Gomez v. Alexian Bros. Hosp.*, 698 F2d 1019 (CA 9, 1983); *Owens v. Rush*, 636 F2d 283, 287 (CA 10, 1980); *Zaklama v. Mt. Sinai Med. Center*, 842 F2d 291, 294 (CA 11, 1988). *See also, Moland v. Bil-Mar Foods*, 994 F.Supp. 1061 (ND Iowa 1998) (CA 8). If a defendant's control of access to employment opportunities can establish its liability as an employer, those opportunities are necessarily "substantial financial benefits" for a statutory employee, because they are the benefits for

which the employee works. For an attorney, professional employment and advancement constitute the only means by which to earn financial benefits. The decision did not discuss any of this legal precedent.

In the circuit cases cited above, plaintiffs usually enjoyed employment opportunities with third parties beyond the control of the defendant. In contrast, York worked directly for the defendant Association and it directly controlled access to the employment opportunities she enjoyed outside the Association. A. 12-18, 29-43, 185. The Association itself contacted third parties, introduced York, and widely publicized her work to hundreds of potential employers including, the UN and all its foreign missions, the ABA and state bar associations, government agencies, universities, the financial community, nationally and internationally renowned experts in several fields, hundreds of program audience members, and others. A. 12-18, 170, 196, 202 n.40, 263, 281-282. Respondents introduced York to the government of Micronesia, and its Congress hired her as its counsel for foreign affairs because of the work she had done for the Association. A. 282.

The decision rejected all of the financial benefits alleged by York as "incidents of group activity." 8a; 286 F3d at 12. But there *was* no "group activity" in international environmental law at the Association until York's work there created activities which other members later joined. A. 12-18, 262-264. Other members had declined to help create that new field. A. 197 n.34. The Association testified that the new committee York originated enabled it to participate in the Earth Summit, that the "seminal" first program she presented was "a major reason" why the Association created that committee, and that without her mostly unassisted work two years earlier it would not have been able to participate in the Earth Summit. A. 170. A member of the new committee told Kass, "Without Alexandra's work none of us would be here." A. 57.

"Voluntary member organizations" may sometimes need a specialist to think ahead, define projects and lead the organization in a new direction which the group will follow. That is why the Association hired York in 1989 to create what it called a "brand new

field." The decision failed to recognize that York was *not part of* but *the head of* and driving force of a highly specialized *new activity.* Hers was not "group activity" but a *special position* of great importance, focused on technical issues from climate change to new forms of international financing. A. 12-18, 34, 271, esp. 34. The head is the moving force without which the "group" may not move.

Usually new international projects would have been assigned to a subcommittee of an existing Association committee as part of the Association's "group activities", because Association committees traditionally guard their jurisdictions and are unwilling to surrender them. A. 202 n.39. But in this case the chairs of several committees, after discussions with York, surrendered what could have become a significant part of their jurisdictions and asked the Association president to create a new committee -- not a subcommittee -- because the new "group activities" she envisioned were so specialized they required a specialist to define and develop them as a new direction for the Association. A. 14-15, 197 n.34. Committee chairs and a former executive director wrote the Association president urging appointment of York as CIEL's first chair. A. 30. York proposed and developed international environmental projects for the Association mostly unassisted for nearly two years, until the new committee York had proposed and urged the Association to create became operational. A. 25-26, 197 n.34. Until that time there were no "group activities" in that field at the Association.

Kass's appointments as chair of the new committee and the Association's delegate to Rio and other lucrative financial benefit he enjoyed were "incidental benefits" of the "group activity" York had created to which the Association had promised her access. A. 197 n.34. Further, since the Association was permitted only two Earth Summit delegates, that particular activity was available to only two members, not the 22,000-member "group". A. 41, 59, 170.

The decision also said York's Association benefits were "not substantial" as a matter of law, without considering the value of any of them. 8a; 286 F3d at 126. The Record disproves that statement. As in *Hishon,* the employment opportunities the Association

promised York were "a recruiting device" that induced her to work for it. A. 72, 270, 274-81, esp. 278 and 283. The inchoate possibility of unspecified employment opportunities available to all members of the Association never induced her to work for until it promised her access to the specific opportunities that could be expected to arise in her new field. A. 261-263, 273-83. If the Association had not promised York access to those opportunities she would not have worked for it. After rejecting Association offers to work for it for 10 years, York finally undertook what she and other Association members had repeatedly declined and worked for the Association for two and a half years, often nearly full-time, to develop the new field. A. 278. She worked not solely to benefit the Association but primarily to gain the promised recompense of remunerative employment opportunities in that new field. A. 278-83, esp. 281. The most important employment opportunities to which the Association repeatedly promised York access from 1989 until 1992 were opportunities to represent it at the Earth Summit and to win salaried work in her field in the United States, and all the work York did for the Association was designed to advance those specific goals. A. 12-18, 29-54, 262-264, 269-283, esp. 34, 38, 43, 50, 56-60, 273-74, 277-279, 281.

The immediate financial support the Association gave York , including project costs, reimbursements, workspace, clerical and professional staff, extensive publicity and opportunities for tax deductions were very valuable. They enabled her to do work she could not have done otherwise, since the State Attorney General does no international work, and to obtain full-time employment in her new field. A. 282. Because the field of international environmental law *was* new, opportunities both inside and outside the Association were much greater than in more traditional legal areas that were the focus of the Association's "group activity" and were therefore "substantial compensation." As the originator of the new committee, and in reliance on the Association's written promise to her, York expected serious consideration to be appointed its first chair and the Association's delegate to the Earth Summit. A. 30, 40-41, 275. Her opportunities for legal practice or consulting in that

new field would also have been unusually great because she was the ground-breaker. A. 196, 197 n.34.

The financial value of all the benefits the Association promised York was also unusually great because it was tied directly to the Association's undisputed reputation and influence as the "most prestigious" and "most prominent bar association" in a new field of legal practice. The Association exercises great control over access to opportunities in the legal profession and elsewhere at all times, but in a new field of law that reputation and influence were especially great. A. 62, 253, 278-83. For these reasons, the non-wage compensation it offered York was unparalleled and *sui generis*. A. 255, 279. The wide publicity the Association gave York's work led immediately to her gaining national and international prominence in a new field of law. A. 61-62. The U.S. Environmental Protection Agency told the Association her first program was "seminal" and that "nothing like it [had] been done in the U.S." A. 271. The then-UK Ambassador to the UN said York was "the dynamo for clearly vital work" to prepare for the Earth Summit. A. 34. The UN Environment Programme described her work as "brilliant" and foreign governments praised it as "pioneering." A. 17, 34, 158, 269-73, 281-83. Not many employers can offer their employees such great opportunities for rapid professional and financial advancement. It is well known that lawyers often take substantial cuts in salary or even work for no pay in order to obtain the deferred but more valuable compensation of employment opportunities. A. 279, 297.

With introductions, endorsements and recommendations from the Association, York was appointed to the environmental advisory committee of the Practicing Law Institute; listed in Who's Who in American Law; invited to speak, write, teach, and participate in national and international conferences; and invited to join the prestigious Century Association. A 17-18, 21, 185, 193, 269-73, 281-83. The American Bar Association invited York to become a member of that organization and its officer in charge of programs for women in the legal profession, and also invited her to present international environmental programs for the ABA at its meetings

around the country with all expenses paid, which she did. A. 17, 18. The Micronesian Congress hired her as its counsel for foreign affairs to represent it at conferences around the world. A. 282. York did not want to leave the U.S. and did so only after the Association disavowed her work and she could not find employment in her field in the U.S., but her work for the Association nevertheless enabled her to find full-time employment in a new field of legal practice. A. 4, 62, 77-79, 90-120.

The opportunity to represent the "prominent" Association at the Earth Summit was very valuable. As CIEL chair and the Association's delegate to the Earth Summit, Kass was introduced by Brazilian Central Bank officials to a Central Bank audience after a day-long meeting there and distributed his business cards to that audience from the Central Bank auditorium stage. A. 196. He also granted national and international press interviews and participated in other well-publicized events in that new field of law, gathered information for articles he would write in New York, and developed other valuable new employment opportunities. *Id.* and 58-60, 202. The decision did not discuss any of those financial benefits.

Finally, the decision conflicts with circuit law that has said compensation cannot be decided as a matter of law because it is not precisely defined by law or statute, and law that recognizes tax deductions as Title 7 compensation. *Haavistola,* F3d at *221-22,* cited with approval by the Second Circuit in *Pietras*, 180 F3d at 473 and *O'Connor*, 126 F3d at 130. In rejecting York's benefits as Title 7 compensation as "insubstantial" without examining any of them, the Second Circuit effectively reverses its compensation decisions in *Pietras, id.*, and *O'Connor, id.*, and *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (CA2, 1982). The Second Circuit's new Title 7 requirement for wage-based compensation requires review by this Court because it conflicts with *Alamo* and *Hishon* and with decisions from at least 10 other circuits regarding a basic question under Title 7. Employment opportunities should be one of the most valuable forms of compensation under a statute designed to promote employment opportunity.

If left standing, this decision will have adverse consequences throughout the nation for years. Because it conflicts with many decisions from this Court and several circuits, and because Title 7 interpretations are "persuasive authority" for interpretations under the FLSA, ADA and ADEA, the decision will increase litigation and increase the burden on federal courts until this Court determines whether members of a professional association can be *per se* excluded from statutory employment as association employees as a matter of law and whether promised employment opportunities may be statutory compensation.

2. The Decision Below Merits This Court's Review Because It Conflicts With Decisions of This Court and New York State's Highest Court And Effectively Establishes A New Federal Rule Of Civil Procedure Regarding Application of State Preclusive Laws.

This Court has held that State preclusive statutes are not to be applied by rote but require examination of the State proceedings that purportedly defeat federal jurisdiction. *Kremer,* 456 US at 481-482. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment (*id.* at 482), or law (*Pan American World Airways Inc. v. New York State Human Rights Appeal Board*, 61 NY2d 542). *See also Linkletter v. Walker,* 381 US 618, 629 (1965) (court should consider purposes and effects of rule in question). The decision effectively establishes a new federal rule of civil procedure that applies a state preclusive rule as an absolute bar. The decision tacitly agreed with the district court' statement to the parties that New York's election remedies law (NY Exec. Law §§297-298,17a) is an absolute bar to federal jurisdiction, even if the State denies a litigant due process. 10a; 286 F3d at 127-28; *compare* A. 229. The decision did not discuss any of the facts or law that defeat preclusion here. By applying this State bar as absolute, in circumstances where respondents admit DHR refused to hear York's federal or state employment claims, the decision also violates both *Kremer's* rule that Title 7 guarantees one full hearing on an employment discrimination claim (456 US at 281) and *Logan's* rule

that the State guarantees the same for a discrimination claim under State law (455 US 432-37).

New York's highest court has held that §297 may not apply even where the statute itself says its application is "not reviewable." *Pan American World Airways*, 61 NY2d at 547-48, citing *Logan,* 455 US at 428-33. The decision's statement that York cannot assert her state claims in federal court because she "can only exercise a statutory . . . right . . . as the statute . . . provides" (10a; 286 F3d at 127) conflicts with New York law that holds statutes are not absolute and bow to constitutional protections *Pan American* at 61 NY2d at 547. Where as here those laws operate to deprive a litigant of opportunity for a hearing or appeal that satisfies constitutional requirements, they do not apply. *Id.*

When confronted with state preclusive rules such as NY Exec. Law §§297(9)-298, a federal court cannot apply them unless the state law or proceeding which purports to preclude federal review satisfies "the minimum procedural requirements of the 14th Amendment's Due Process Clause (*Kremer*, 456 US at 481) and Equal Protection Clause (*Logan,* 455 US at 442, concurring opinion). Congress intends that federal courts should "defer only to adequate state laws" regarding Title 7 (*Kremer,* 456 US at 472) and a claimant is entitled to a "full and fair opportunity to present his charges on the record, including his own testimony, witnesses, rebuttal and all exhibits which he wishes to present." *Id.* at 483. In federal court preclusive rules do not apply when the party against whom the earlier decision is asserted did not have "a full and fair opportunity to litigate the claim or issue in question ... and ... redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of the procedures followed in prior litigation." *Id.* 480-481 and cases cited therein.

New York courts agree that claimant rights under its employment discrimination laws create a constitutionally protected property interest of which a claimant may not be deprived "unless an opportunity is granted for a hearing appropriate to the nature of the case." *Pan American*, 61 NY 2d at 548, citing *Logan,* 455 US at 428-433. *Logan* rejected the argument that a state procedural

requirement could deprive a litigant of a constitutionally protected property interest "without appropriate procedural safeguards." *Id.* at 432. Application of the election bar here would deprive York of her federal and state employment and her public accommodation claims without appropriate procedural safeguards, in violation of *Kremer*, *Logan* and *Pan American*. Those state claims are valuable because they offer more expansive remedies than Title 7. In applying §§297-298 as absolute rules, the decision did not discuss *Kremer*, *Logan* or *Pan American*. 10a; 286 F3d at 127.

In theory DHR offers all the procedural protections required by *Kremer,* 456 US at 483-84 and *Logan* at 276. But procedures valid on their face may be unconstitutional as applied. *Boddie v. Connecticut*, 401 US 371, 379-81 (1971). In this case DHR denied the theoretical procedural opportunities. A. 8-12, 286-89. Respondents admit York had no hearing on her federal or state employment claims. A. 228. Respondents told the district court DHR "did not permit argument regarding employment because [it] determined it was not employment." *Id.* DHR refused to acknowledge its 1992 amendment of her complaint to allege employment violations following its fact-finding investigation, or the EEOC dual-filing number it gave the complaint to correct its original error in identifying it as one alleging only public accommodation violations. A. 126, 128, 130.

Further, after York accepted employment in Asia, DHR did not reply to her repeated inquiries regarding the status of her complaint, from 1993 to 1997, until she traveled from Manila to New York to inquire in person. A. 286. After DHR's 6-year delay in scheduling the 1998 hearing, the DHR administrative law judge (ALJ) denied as "time-barred" York's efforts to amend the complaint before the hearing to name respondents Harper and French and to confirm her employment claims. A. 286-287, 289. In doing so, DHR violated its procedural regulation that complaints can be amended "before the commencement of a hearing." 9 New York Code, Rules and Regulations §465.4, 19a, A. 286. An agency's violation of its own regulations, as DHR violated its regulation (9 NYCRR §465.4), is itself reason to review the administrative decision to determine if it

is "purely arbitrary" and therefore reversible. *Pan American,* 61 NY2d at 547-48. As in *Logan,* here the State system itself destroyed York's property interest in her employment claims, by failing to convene a timely hearing and then denying amendment of her complaint to allege employment as "time-barred." 455 US at 278.

Nor did DHR offer a "full and fair opportunity" to litigate her public accommodation claim, as required by *Kremer, Logan* and *Pan American*. "Public accommodation" need not be a physical structure and includes provision of services. *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19 (CA1, 1994). The most important public accommodation the Association offers its members are employment opportunities. A. 278-82, 287-94. Respondents admit DHR "refused to hear argument" from York regarding employment. A. 228. Employment was only "briefly explored" with "no significant exploration" of that issue. *See, Hill v. Coca Cola Bottling Co.*, 786 F2d 550, 553-54 (CA2, 1986). DHR's refusal to hear argument from York regarding employment claims and its refusal to grant her a hearing on her public accommodation complaint that satisfied the "minimum procedural requirements" of the 14th amendment effected a deprivation of property without due process.

DHR also violated the 14th Amendment's equal protection clause when it allowed the Association to present evidence regarding York's work during presentation of its case, but denied York that opportunity (A. 8-9). The ALJ allowed the Association to present all the testimony, witnesses and exhibits it wished and to conduct cross-examinations. A. 8-9, 288-89. The Association presented 10 witnesses, all of whom testified about York's work for the Association. *Id.* The ALJ on her own motion called an member of the Association to testify about York's work. *Id.* York was permitted to present only three witnesses, none of whom had first-hand knowledge of her work at the Association. A. 8, 182, 287. When York attempted to present one witness to rebut respondents' 10 witnesses, the ALJ refused saying she had "heard enough about York's work." A. 9, 288. DHR denied York equal protection when

it ignored her EEOC dual-filing number, DHR's amendment of her complaint to allege employment violations, and the Title 7 law she submitted to it upon the direction of the Division general counsel, but accepted the Association's unsupported argument that she could not be the Association's employee because she was not paid. A. 126, 130, 173 n.10. As in *Logan,* §297 effectively (although not expressly) creates two categories of discrimination claimants. 455 US at 439 (concurring opinion). Some of them receive DHR hearings on their claims, and some -- like York -- are denied a hearing. *Id.* These two effective categories of claimants violate the Equal Protection Clause because claimants should "stand on the same footing." *Id.* at 442 (concurring opinion). By refusing to hear York's employment claims, DHR also violated the terms of its work-sharing agreement with EEOC, whereby EEOC automatically defers Title 7 cases to DHR for initial adjudication. 42 USC §2000e-5 (c); *Kremer*, 456 US at 463.

Like §297 provisions for a hearing, §298 provisions for appeal are adequate as stated but fail upon the circumstances of this case. Section 298 offers only "substantial evidence" review of a §297 hearing in a NY Civil Practice Law and Rules Article 78 proceeding regarding issues "actually decided," or "arbitrary and capricious" action. 15a. *Pell v. Bd. of Education*, 34 NY2d 222, 230 (1974). The limited judicial review offered by §298 in an Article 78 proceeding rests upon a statutory assumption that DHR offers a constitutionally adequate §297 hearing, where claimant was allowed to present testimony, witnesses, exhibits and rebuttal. *Kremer*, 456 US at 481-482. Since there was no DHR hearing on York's federal or state employment claims, logically there can be no "substantial evidence" review of a hearing that did not take place on those claims. The purported DHR hearing on York's public accommodation claim did not satisfy *Kremer* or *Logan*'s "minimum procedural requirements," as discussed above. Since the §298 premise of a procedurally adequate §297 hearing failed for both York's employment and public accommodation claims, substantial evidence review for those claims is constitutionally inadequate. A. 287-91, 8-9; *see Kremer* 456 US at 479-81.

The decision also conflicts with this Court's rule that equitable statutes such as §§297-298 should not be applied by rote. *Cipriano v. City of Houma,* 395 US 701, 706 (1968). Here equity argues against the election bar for several reasons. First, the Second Circuit applies §§297-298 because it assumes New York and federal courts apply "virtually identical" legal standards to adjudicate Title 7 claims. *Kremer* at 479. But DHR refused to apply federal law regarding the Title 7 benefits test for compensation. Second, in an Article 78 proceeding, York would have been required to name DHR as a party, and her former employer, the Attorney General, would have been required to enter the case as counsel for DHR. NY CPLR Article 78 §7804(c), 15a. Respondents would then have enjoyed a privileged position with York's former employer in an employment case where respondents have argued that her salaried work with the Attorney General precluded other Title 7 employment. A. 265 n.6.

Third, a state appeal would have compromised and perhaps lost testimony from York's most critical witness. York had told only two people about the unwelcome sexual advances of respondents Kass and French at the time they occurred from 1990 until 1992. A. 45. They were her best friend and her office mate, also an assistant attorney general in the office of the New York State Attorney General. Her best friend died in 1993. *Id.* The only person who could then offer a contemporaneous account of the these events was her former office mate, who did so during the DHR hearing. A. 188 n.24. In an Article 78 proceeding her former office mate would be torn between his duty to testify fully and freely for York and his duty to his employer. That is an intolerable burden upon a witness, dependent upon his salary, especially where, as here, the statutory purpose to permit only one full hearing would still be achieved. The right to present testimony is one of the most important constitutional rights afforded a litigant.

Fourth, respondents told the district court that these parties "would never get a judge" if they sought one who is not a member of the Association. A. 237. Both the district judge and the author of the decision are members of the Association. *Id.*, and 1a; 286 F3d at 122. Having to accept a judge who is a member of the

defendant organization may alone infringe a litigant's right to an impartial arbiter. But New York state court judges must seek re-election every few years and often or usually depend upon the endorsement of the Association. In close elections that endorsement or refusal to endorse can be decisive. A judicial system that prizes impartiality should not require a litigant to plead her case to a judge who may depend upon the defendant even partly for his own continued employment. This Court has recognized that determination of employment discrimination claims "requires non-partisan judgment" which in certain circumstances may be "best afforded by federal . . . judges who, shielded from political influence by life tenure [and] and supported by historical judicial independence . . . are more likely to withstand political pressures." *See, e.g., Chandler v. Roudebush*, 425 US 840, 851 (1976), *citing US Senate Report 85 of 1971*.[3]

For all these reasons, as in *Logan*, 455 US at 436, the post-deprivation remedy offered by §298 was inadequate in this case. The decision did not discuss any of them. Further, the decision's statement that York "freely elected" the DHR remedy (11a; 286 F3d at 128) is not true. York first tried to file a claim with EEOC but it told her to file with DHR. A. 285. Assuming York did elect state remedies, that election failed because DHR refused to hear her state or federal employment claims and did not give her a hearing on her public accommodation claim that satisfies the "minimum procedural standards" required by this Court and New York's highest court. *See, Kremer and Pan American.* Congress intended that federal courts should defer only to adequate state laws that are applied as the legislatures intended. *See, e. g., Kremer* at 471.

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3. The Opinion improperly added the letter "d" to the word "influence," and said York argued that the Association "influence[d]" the DHR decision. 11a; 286 F3d at 128. She did not say that. The Record demonstrates the Association's influence. *See, e.g.*, A. 173 n.10, 253-257, 287-294. Over 30 attorney attorneys declined to represent York in this litigation, even with a fee. A. 256. Most said they "could not" or "would not go against the Association." *Id.* One told her, "You cannot go against the Association." *Id.* The Association admits it seeks to "add to . . . the respect and authority with which its pronouncements are received both within and without the legal community." A. 173 n.10, 257.

These "special circumstances warrant an exception to the normal rules of preclusion." *Allen v. McCurry*, 449 US 90, 113 (1980). York should be permitted to demonstrate that she did not have "a fair opportunity procedurally, substantively, and evidentially to pursue [her] claim the first time." *Blonder-Tongue v. Univ. of Illinois*, 402 US 313, 333 (1971). The Court should ask whether plaintiff without fault of her own was deprived of opportunity to submit critical evidence or witnesses; whether the Division employed the correct legal standards; and whether the Division "wholly failed to grasp the technical subject matter and issue in suit." *Id.* York has a right to trial *de novo* on her Title 7 claim because a civil action in federal court after an EEOC decision, as this is, is intended to offer trial *de novo*. *See, e.g.., Kremer* at 477. Initial resort to state remedies cannot deprive a federal litigant of trial *de novo* where, as here, respondents admit the state did not grant the "remedy" she purportedly elected, *i.e.* a constitutionally adequate hearing on her employment and public accommodation claims. *Id.* York should be afforded the constitutionally adequate hearings mandated by *Kremer, Logan,* and *Pan American* for both her Title 7 and state employment claims and her public accommodation claim.

In the interests of comity and federalism, this Court could assert federal jurisdiction pursuant to two statutory exceptions under §297(9). The first exception explicity permits an election of remedies to be annulled. 17a. In this case, the election of remedies should be annulled because DHR dismissed York's employment claims without a hearing, as discussed above. The second exception directs that where DHR takes no action upon a complaint, it may dismiss that complaint for administrative "inaction" and a claimant is then free to seek judicial relief as though no administrative election had been made. *Promisel v. First American Artificial Flowers, Inc.*, 943 F2d 251(CA 2, 1991); cert. denied 502 US 1060 (1992). 17a. Because DHR held no hearing upon York's federal or state employment claims, DHR dismissal of those claims is the equivalent of administrative "inaction" under *Promisel*. Interests of comity and federalism would also be served by asserting federal jurisdiction pursuant to *Pan American's* rule that §297 does not

apply where, as here, §297 would deprive a litigant of opportunity for an appeal, or, in this case, even a hearing. *Pan American*, 61 NY2d at 545.

CONCLUSION

Given the many conflicts between the decision and Supreme Court, Circuit and State precedent, this Petition raises constitutional issues and a federal question of exceptional importance that warrant review by this Court to secure uniformity of the governing law. This published opinion should be reversed, because if left standing it will set unconstitutional precedent for years to come regarding statutory employment coverage and compensation and federal procedure regarding preclusive state rules.

Dated: New York, New York
September 23, 2002

Respectfully submitted,

ALEXANDRA YORK, Esq.
Plaintiff-Appellant, *pro se*
c/o William A. Delano, Esq.
114 East 10th Street
New York New York 10003
(212) 982-3574

Of Counsel:
William A. Delano

No.

IN THE

Supreme Court of the United States

October Term, 2002

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX

Appendix A
Opinion of the USCA for the Second Circuit
Decided April 3, 2002 [Pages 1a – 11a]

FOR THE SECOND CIRCUIT

August Term 2001

(Argued February 7, 2002 Decided April 3, 2002)

Docket No. 01-7908

ALEXANDRA YORK,

Plaintiff-Appellant,

—v.—

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

Before:

POOLER and SOTOMAYOR, *Circuit Judges,*
and GARAUFIS, *District Judge.**

---

* The Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A

Appeal from a judgment in the United States District Court for the Southern District of New York (Chin, J.) dismissing plaintiff-appellant's claims for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and New York Human Rights Law, N.Y. Exec. Law §§ 290, et seq., and New York City Human Rights Law, N.Y.C. Admin. Code § 8-502, arising out of purported constructive discharge of plaintiff by virtue of harassment suffered while volunteering for defendant-appellees, and other discriminatory acts.

AFFIRMED.

ALEXANDRA YORK, *pro se*, *Appellant*.

WILLIAM T. RUSSELL, JR., Deborah N. Archer, Susan Digilio, Simpson Thacher & Bartlett, appearing *for Defendants-Appellees*.

GARAUFIS, *District Judge*.

Plaintiff-appellant Alexandra York appeals from an order of the United States District Court for the Southern District of New York (Chin, J.) granting defendants-appellees' motion to dismiss her complaint for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6). The district court held that York was not an employee under Title VII, and that York's state and city law claims were barred by her election of an administrative remedy. For the reasons discussed, we find the district court was correct in holding that York's volunteer activities for the Association of the Bar of the City of New York (the "Association") did not make her an employee under Title VII, and we also find the election-of-remedies

provisions in the Human Rights Law and the New York City Code validly barred York's state and city law claims as brought before the district court below. We therefore affirm the district court's dismissal of the claims.

BACKGROUND

York was a dues-paying member of the Association from 1979-1992, and was employed full-time as an Assistant Attorney General in the Environmental Bureau of the New York State Department of Law at all times relevant to the action before the court. From 1979-1987, York was an inactive member of the Association. In 1987, York became a member of the Association's environmental law committee, but her activity in that role was minimal.

From 1989-1992, York was more active with the Association. In October of 1989, York proposed a program on international environmental issues that she subsequently developed and ultimately presented, under the auspices of the Association, six months later. Following that program, York began work on the following projects: creating a new Association committee on international environmental law; Association participation at the first United Nations Conference on Environment and Development ("UNCED"); publication, in concert with five law schools, of a short discussion of major issues relevant to UNCED (this project was ultimately abandoned); and presentation of two programs pertaining to climate change and UNCED, respectively. When York's membership on the environmental law committee expired in 1990, she was invited to join the Association's international law committee. Pursuant to York's activities with the Association, the Association provided York with workspace, clerical support, publicity, and reimbursement for out-of-pocket expenses. Additionally, York took tax deductions for

expenses that were not reimbursed, and she enjoyed networking opportunities.

Appellee Stephen Kass became the first chair of the new international environmental committee. York alleges that Kass made sexual advances towards her, and when York was unreceptive, Kass limited her ability to participate in the Association's international environmental programs, and prevented her from attending UNCED under the auspices of the Association. York subsequently ceased her membership with the Association.

The State Administrative Action

In May 1992, York filed a charge of unlawful discrimination in a place of public accommodation with the New York State Division of Human Rights (the "NYSDHR"). York brought the charge against the Association and Kass, and the charge did not include employment discrimination claims. The charge before the NYSDHR was dormant from 1993 through February 1998, during which time York lived in Micronesia, Indonesia, and the Philippines. In March and June of 1998, a ten-day hearing on the charge was held before an administrative law judge ("ALJ"). At the hearing, York argued for leave to amend her complaint to add a claim of employment discrimination. The Commissioner of the NYSDHR (the "Commissioner") dismissed York's charge on August 20, 1999. Pursuant to the dismissal, the Commissioner denied York's attempt to amend her complaint, finding York was not an employee of the Association. York did not appeal the dismissal. In September of 1999, however, York requested by letter that the Equal Employment Opportunity Commission (the "EEOC") review the dismissal of her NYSDHR action. In April 2000, the EEOC denied her request and adopted the findings of the NYSDHR.

Appendix A

The Decision Below

On August 11, 2000, appellant York filed a complaint in the United States District Court for the Southern District of New York against the Association, former Association president Conrad Harper, and former Association committee chairs Stephen Kass and John French. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), the New York Human Rights Law, N.Y. Exec. Law §§ 290, et seq. (the "NYHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502 (the "CHRL").[1] The defendants moved to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Appellees argued first that York was not an employee under Title VII, and second that York's state and city law claims were barred by election-of-remedies provisions. By memorandum decision of July 9, 2001, the district court granted the defendants' motions to dismiss, agreeing that York was not an employee under Title VII, and that the state and city law claims were barred by election of remedies provisions.

DISCUSSION

We review de novo the district court's granting of defendants' motion to dismiss pursuant to Rule 12(b)(6). *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001). On a motion to dismiss for failure to state a claim, we construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true. *Connolly v. McCall*, 254 F.3d 36,

---

[1] Appellant also brought defamation and intentional infliction of emotional distress claims, but they were withdrawn by York with leave of the district court on December 13, 2000. Consequently, we do not consider those claims.

40 (2d Cir. 2001). To survive a motion to dismiss, however, the complaint must allege facts which, assumed to be true, confer a judicially cognizable right of action. Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The Title VII Claims

Appellant York's first argument on appeal is that the district court erred in finding that York was not an employee of the Association within the meaning of Title VII. She argues that although she served the Association in an unpaid, volunteer capacity, she satisfies this Circuit's definition of an employee under Title VII. We disagree.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit . . . his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.

Title VII further defines employee as "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f). We have refined the rather elliptical statutory definition to hold that "a prerequisite to considering whether an individual is [an employee] is that the individual have been hired in the

first instance." *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997). Furthermore, we have stated "that the question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received direct or indirect remuneration from the alleged employer." *Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999) (internal quotations omitted). Thus, we have held:

> Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because although 'compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship.'

O'Connor, 126 F.3d at 115-116 (quoting *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir. 1990)).

We have identified the following factors as indicative of "financial benefit": salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing. *O'Connor*, 126 F.3d at 116. We have further held that benefits must meet a minimum level of "significance," or substantiality, in order to find an employment relationship in the absence of more traditional compensation. *Pietras*, 180 F.3d at 473. In *Pietras*, we found benefits sufficient to satisfy the "remuneration test" in the form of "(1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits." *Pietras*, 180 F.3d at 471.

Unlike a salary, vacation, sick pay, or benefits such as health insurance, disability insurance, life insurance, death benefits, and retirement pension, all of which primarily benefit the employee independently of the employer, the benefits

put forward by York, such as clerical support and networking opportunities, were merely incidental to the administration of the Association's programs for the benefit of the bar at large. In other words, the list of benefits York recites was merely a necessary incident to the Association staging volunteer programs for the legal community. The purpose, however, of a volunteer member organization is to facilitate activity by its members in furtherance of the organization and its objectives. Thus, to make the incidents of group activity, without more, a benefit sufficient to satisfy the remuneration test, is to render all volunteer activity "employment" under Title VII. This is not so. In the absence of a clear contractual employer-employee relationship, a party claiming to be an employee under Title VII must come forward with substantial benefits not merely incidental to the activity performed in order to satisfy this Circuit's remuneration test.

Further, even if the benefits put forward by York were not merely incidental to her activities for the Association, they were not sufficiently substantial to meet the remuneration test. Clerical support, limited tax deductions, and "networking opportunities" are not the sort of substantial benefits that distinguish for remuneration purposes cases such as *Pietras*, which found an employee relationship under Title VII, from cases such as *O'Connor*, which did not. Thus we cannot find that York was an employee of the Association for Title VII purposes.

The NYHRL and CHRL Claims

Appellant York's second argument is that the district court improperly dismissed her NYHRL and CHRL claims as barred by statute and code because she previously raised those claims in state administrative proceedings. She argues that application of the election-of-remedies provisions to her state and city law rights of action results in a denial of her

constitutional rights to due process and equal protection.[2] We disagree.

N.Y. Exec. Law § 297(9) provides a right of action against unlawful discriminatory practices. Section 297(9) applies, inter alia, to both employment discrimination and discrimination in places of public accommodation. N.Y. Exec. Law § 291(1), (2). The CHRL provides a similar right. As the district court recognized, "the language of the CHRL is nearly identical to that of § 297(9)", and discussion of the latter applies equally to the former. *York v. Ass'n of the Bar of the City of New York*, No. 00-5961, 2001 WL 776944 at *5 (S.D.N.Y. July 9, 2001)[3] (citing N.Y.C. Admin. Code § 8-502(a)).

---

[2] Appellant also argues that her employment discrimination claims, which were litigated before the NYSDHR, were dismissed pursuant to administrative convenience, N.Y. Exec. Law § 297(9), which would allow appellant to relitigate her employment claims in any court of her choosing. But a dismissal for administrative convenience is a specific statutory instrument, and the NYSDHR did not use that instrument to dismiss the employment discrimination claims.

York seeks to bring herself within another exception to the election-of-remedies bar that was created for charges filed with the EEOC and then referred by the EEOC to the NYSDHR pursuant to Titile VII requirements. York argues that although she herself filed her charge with the NYSDHR, the EEOC "directed" her to do so. But the exception applies only when a charge is filed first with the EEOC, which then files it by automatic referral with the NYSDHR. *Wiley v. Citibank, N.A.*, No. 98 Civ. 1139, 2000 WL 122148, at *2 n.1 (S.D.N.Y. Feb. 1, 2000); *Bawa v. Brookhaven Nat'l Lab., Associated Univ.s, Inc.*, 968 F. Supp. 865, 868-70 (E.D.N.Y. 1997). York, who filed her charge with the NYSDHR after seeking the EEOC's advice about where to file, did not suffer from the forced-election predicament that the exception is intended to remedy.

[3] We note for reference purposes that although the Memorandum Decision of the court below is dated July 9, 2001, the Westlaw citation is dated July 11, 2001.

The NYHRL provides,

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate . . . unless such person had filed a complaint hereunder or with any local commission on human rights.

N. Y. Exec. Law § 297(9). Thus, by the terms of the statute and code, respectively, the NYHRL and CHRL claims, once brought before the NYSDHR, may not be brought again as a plenary action in another court. *Moodie v. Federal Reserve Bank of New York*, 58 F.3d 879, 882 (2d Cir. 1995). Furthermore, once a plaintiff brings a case before the NYSDHR, he or she may appeal only to the Supreme Court of State of New York. N.Y. Exec. Law § 298. Appellant failed to appeal the adverse rulings by the NYSDHR to the Supreme Court of the State of New York, and instead attempted to relitigate her claims in the United States District Court, in contravention of the statutory and code schemes detailed above.

The rights of action appellant attempts to assert are self-limiting, statutorily and code-created rights. Consequently, appellant can only assert the rights of action as prescribed by the respective statute and code. Simply put, a party can only exercise a statutory or code-created right of action as the statute or code provides. Furthermore, there is no question that the election-of-remedies provisions at issue here apply to federal courts as well as state. *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000). Likewise, there is no question that N.Y. Exec. Law §§ 297(9) and 298 are valid statutory instruments, and neither represents an inappropriate procedural limitation on the right of action which it modifies. *Moodie*, 58 F.3d at 884 (2d Cir. 1995) (finding § 297(9) to be a valid state law restriction on the

state law right of action). Moreover, nothing in the particular facts of this case indicates that the valid statutory and code schemes in any way fail constitutional guarantees of due process or equal protection, and appellant York does not present any legitimate argument to that effect.

Finally, York contends that the "ubiquitous presence and influence" of the Association made her reluctant to appeal the adverse rulings of the NYSDHR to a New York state court, and that her reluctance was justified by the treatment given her claims by the Division, which she argues was "influence[d]" by the Association and its prestige. Both arguments are without merit. First, York's conclusory allegation that the Association influenced the NYSDHR's decision is essentially duplicative of her contentions regarding the constitutional infirmity of the administrative forum, which we have already rejected. Second, without expressing an opinion as to York's assertion that the Association's centrality in the legal profession would effectively have precluded her from obtaining a fair hearing in state court, we note that York, an attorney familiar with the Association and its membership, freely elected to seek a remedy in the NYSDHR. She cannot now be heard to complain that the forum she chose was infected by bias.

Thus, we find the district court correctly dismissed the state and city law claims due to the bar imposed by the election-of-remedies provisions.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED in its entirety.

Appendix B
Order of the USCA for the Second Circuit (Denying Petition for Rehearing), June 25, 2002 [Pages 12a – 13a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of June two thousand two.

ALEXANDRA YORK,

Plaintiff-Appellant,

Dkt No: 01-7908

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONRAD HARPER, a former Association president, STEPHEN C. KASS, a former Association committee chair and JOHN FRENCH, a former Association committee chair,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Alexandra York.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By: _____
Arthur Heller,
Administrative Attorney

Appendix C
Applicable Citations [Pages 14a – 19a]

42 U.S.C.A. §2000e

§2000e. Definitions

For the purposes of this subchapter--

* * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 USCA §12111

§12111. Definitions

As used in this subchapter:

* * *

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

Appendix C

29 USCA §630

§630. Definitions

For the purposes of this chapter--

* * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 USCA §203

§203. Definitions

As used in this chapter--

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

* * *

NY CPLR Article 78

§ 7804. Procedure

* * *

(c) * * *

In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this

section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county.

* * *

NY EXECUTIVE LAW §296

§ 296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * *

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

Appendix C

NY EXECUTIVE LAW §297

§ 297. Procedure

* * *

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights . . . provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division.

* * *

No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

NY EXECUTIVE LAW 298

§ 298. Judicial review and enforcement

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as provided in this section. Such proceeding shall be brought in the supreme court in

the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business.

* * *

Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he or she shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding.

* * *

Appendix C

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 9. EXECUTIVE DEPARTMENT
SUBTITLE J. DIVISION OF HUMAN RIGHTS
PART 465. RULES OF PRACTICE

Section 465.4 Amendments to complaint.

(a) Power to amend. The division or the complainant shall have the power reasonably and fairly to amend the complaint. No party may be removed by any amendment. After a hearing is commenced before an administrative law judge, any amendment is subject to the discretion of the administrative law judge.

(b) Complainant's power. The complainant has the right to amend the complaint in a reasonable manner before the commencement of a hearing.

(c) Division's power. The regional director, division attorney, or administrative law judge may reasonably amend the complaint.

(d) Any amendments made after a probable cause determination are not subject to any further investigations or determinations of probable cause.

(e) Service.

(1) Any amendment to a complaint shall be served upon all parties unless made upon the record at a public hearing before an administrative law judge. If an amendment adds new parties, a copy of the notice of hearing must be served upon such parties.

(2) When a complaint is amended after an answer has been filed but before the hearing, each respondent who has filed an answer shall be allowed to file an amended answer with the division attorney at least two business days prior to the hearing.

(2)

Supreme Court, U.S.
FILED

02 667 SEP 19 2002

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2002

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

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Appendix D
Memorandum Decision of the U.S.D.C. For the Southern District of New York, Dated July 9, 2001 [Pages 1sa – 13sa]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALEXANDRA YORK,

Plaintiff,

MEMORANDUM DECISION

v.

00 Civ. 961 (DC)

THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, et al.,

Defendants.

APPEARANCES: ALEXANDRA YORK, ESQ.
Plaintiff Pro Se
c/o William A. Delano, Esq.
114 East 10th Street
New York, New York 10003

SIMPSON THACHER & BARTLETT
Attorneys for Defendants
By: John W. Ohlweiler, Esq.
Deborah Archer, Esq.
Susan E. Digilio, Esq.
425 Lexington Avenue
New York, New York 10017-3954

Chin, D.J.

In this case, pro se plaintiff, an attorney, contends that she was sexually harassed while she was performing volunteer committee work as a member of the Association of the Bar of the City of New York (the "Association"). She sues the Association, two former committee chairmen, and a former president under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), the New York Human Rights Law, N.Y. Exec. Law § 290 et seq. (the "NYHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502 (the "CHRL").

Defendants move to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b) (1) and 12 (b) (6) on the grounds that (1) the Court lacks subject matter jurisdiction because plaintiff fails to state a claim under Title VII, the only basis for federal jurisdiction, because she was not an employee of the Association, and (2) her claims of discrimination under state and city law are barred by the election of remedies doctrine. For the reasons set forth below, defendants' motion is granted and the amended complaint is dismissed for failure to state a claim upon which relief may be granted.

BACKGROUND

I. Facts

For the purposes of this motion, I assume the facts as alleged in the amended complaint to be true.

The Association is a voluntary bar organization with more than 22,000 members. It is open to all attorneys in good standing. At all relevant times, plaintiff was a dues-paying member of the Association. (Am. Compl. ¶ ¶ 19, 26).

From 1989 to 1992, under the supervision of committee chairs, plaintiff developed five international environmental law

projects for the Association. (Am. Compl. ¶ ¶ 72, 74). Defendants John French and Stephen C. Kass both served as committee chairs, and during that time defendant Conrad Harper was president of the Association. (Am. Compl. ¶ ¶ 33-42).

Plaintiff did not receive wages for her activities at the Association, but she "worked for the defendant Association with the expectation that she would receive the employment opportunities which resulted from her work at the Association." (Am. Compl. ¶ ¶ 21-22). Plaintiff alleges that from 1990 to 1992, defendant French "constantly harassed [her] with sexual remarks and propositions." (See Am. Compl. ¶ ¶ 111-15, 118). Plaintiff also claims that because she refused to tolerate French's conduct, plaintiff was denied "employment opportunities," such as support for her Association projects and membership on or chairmanship of committees and/or projects. (Am. Compl. ¶ 124).

Plaintiff further alleges that she was also sexually harassed by defendant Kass, for approximately one year from 1991 to 1992. (Am. Compl. ¶ ¶ 143-44, 174). Plaintiff claims that because she refused to submit to Kass's "sexual advances," Kass denied plaintiff employment opportunities -- specifically, that he did not permit her to participate in certain committee work or to represent the Association at certain conferences. (Am. Compl. ¶ ¶ 173-75, 262).

In May 1992, plaintiff filed a complaint with the New York State Division of Human Rights (the "Division") against the Association and Kass alleging sexual discrimination in a place of public accommodation. (Pl. Exs. A & D).1 Plaintiff claims that because she told French that she filed a complaint with the Division, French rescinded his offer to sponsor plaintiff's application for membership in a private club and

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1 References made to "Pl. Ex." refer to Plaintiff's Exhibits to the amended complaint.

would not continue to work with her.2 (Am. Compl. ¶ ¶ 126-29). The Division refused to allow plaintiff to amend her complaint to add allegations of employment discrimination because plaintiff was "not an employee of Respondent Association, and therefore, cannot make such an amendment." (Pl. Ex. D, at 15). In 1998, the Division held a ten-day hearing in front of an administrative law judge, which resulted in a 1900-page transcript. During the proceedings, plaintiff was represented by counsel. (Am. Compl. ¶ ¶ 48-49, 52). On August 20, 1999, the Division issued a 19-page order dismissing the complaint, finding that the Association and Kass did not discriminate against plaintiff in a place of public accommodation because of her sex. (Pl. Ex. D, at 14). On April 26, 2000 the Equal Employment Opportunity Commission ("EEOC") sent plaintiff a right-to-sue letter. Neither plaintiff's underlying complaint to the Division nor the right-to-sue letter named Conrad Harper or John French as respondents.

II. Procedural History

Plaintiff commenced this action by filing a complaint against the Association, Harper, Kass, and French on August 11, 2000. She filed a 726-paragraph amended complaint on September 19, 2000. Plaintiff does not allege that Harper personally engaged in any harassing or discriminatory conduct, but includes Harper as a defendant because, as president of the Association, he exercised his "authority to select and employ members of the Association to work for the Association and its committees, [and] to supervise, direct, approve, disapprove, and

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2 In the Division complaint, plaintiff alleged misconduct only by Kass, not French. Plaintiff now asserts that upon notifying French that she filed the complaint with the Division, French told plaintiff "Kass is a friend of mine. If you do this, I have nothing further to do with you." (Am. Compl. ¶ 352).

control their work . . . ." (Am. Compl. ¶ 34).

Plaintiff alleges discrimination in employment by the Association on the basis of sex and sexual harassment and retaliation, in violation of Title VII, and discrimination in employment and in place of public accommodation by Kass, French, Harper, and the Association on the basis of sex and sexual harassment and retaliation, in violation of the NYHRL and the CHRL. Plaintiff also asserted claims for defamation and intentional infliction of emotional distress.

On October 25, 2000, defendants filed this motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12 (b) (1) and 12 (b) (6) for lack of subject matter jurisdication and failure to state a claim upon which relief may be granted.3 By memorandum endorsement dated December 13, 2000, the Court granted plaintiff's requests to withdraw the defamation and intentional infliction of emotional distress claims.

DISCUSSION

I. Standard for Motion to Dismiss For Failure to State a Claim

When reviewing a motion to dismiss for failure to state a claim, a court must accept as true the facts presented in the complaint and must view the pleadings in the light most favorable to, and draw reasonable inferences in favor of, the non-moving party. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). A court shall dismiss a complaint only when "it appears beyond doubt that the plaintiff can prove

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3 Defendants contend that the Court lacks subject matter jurisdiction over this action because plaintiff fails to state a viable federal claim. The motion is more properly characterized as a motion to dismiss for failure to state a claim upon which relief may be granted, and I will treat is as such.

no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); accord Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cor. 1998), cert. Denied, 525 U.S. 1103 (1999); Gangemi v. Johnson, No. 98 Civ. 8470, 1999 WL 777861, at *1 (S.D.N.Y. Sep. 30, 1999). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support [her] claims." Villager Pond, Inc. v. Town of Darien, 56 F. 3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)), cert. Denied, 519 U.S. 808 (1996). In considering a motion to dismiss, a court may consider only the allegations of the pleadings and documents that are integrated in the pleading by reference. See I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2d Cir. 1991).

II. Plaintiff's Claims

Defendants move to dismiss the Title VII claims on the grounds that plaintiff was not an employee of the Association and the NYHRL and CHRL claims on the grounds that they are barred by the election of remedies doctrine.

A. Title VII Claims

1. Applicable Law

Title VII prohibits discrimination in employment; it is "available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996) (quoting Tadros v. Coleman, 717 F. Supp 996, 1003 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir. 1990)); see also Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) ("The

objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities."). Title VII does not protect plaintiffs who do not quality as employees. Kern, 93 F.2d at 45. Moreover, it is not a "legal catchall." Tadros, 717 F. Supp. at 1003. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (The 'standards for judging [allegedly discriminatory conduct] are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace." (internal quotations omitted)).

Volunteers are generally not considered employees under Title VII. See O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997); Tadros, 717 F. Supp. at 1003. "Plaintiffs who have without question rendered service to an appreciative defendant are not deemed Title VII 'employees' solely by dint of their labor." Id. (holding volunteers are not employees). "Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because . . . compensation by the putative employer to the putative employee in exchange for his [or her] services is an essential condition to the existence of an employer-employee relationship." O'Connor, 126 F.3d at 115-16 (internal quotation omitted).

The courts have found that "an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits." Pietras v. Bd. Of Fire Comm'rs of the Farmingville Fire Dep't, 180 F.3d 468, 473 (2d Cir. 1999); see also O'Connor, 126 F.3d at 116 (discussing Haavistola v. Cmty. Fire Co., 6 F.3d 211, 221 (4th Cir. 1993)).

Because either direct or indirect remuneration is an essential condition for a relationship to be one of employment under Title VII, the courts have generally found volunteers not to be employees for purposes of Title VII. See, e.g., O'Connor,

126 F.3d at 116 (college student volunteering at psychiatric hospital is not a Title VII employee); Tadros, 717 F. Supp. at 1003 (doctor, whose appointment involved neither pay nor duties, but only library privileges is not a Title VII employee). In Haavistola, 6 F.3d 211, however, the Fourth Circuit held that a volunteer at a fire company who received indirect compensation was an employee under Title VII. Although the plaintiff in that case did not receive a salary, she was deemed an employee because she received benefits such as disability pension, survivors' benefits for dependents, death and disability scholarships for dependents, and group life insurance. Haavistola, 6 F.3d 211, 222 ("the benefits represent indirect but significant remuneration").

2. Application

Here, even assuming the factual allegations of the amended complaint are true, plaintiff was merely a volunteer and her work for the Association did not give rise to an employment relationship. Plaintiff was merely a dues-paying member who volunteered to work on several projects for various Association committees. (Am. Compl. ¶ 19). No reasonable jury could conclude, on the facts alleged in the amended complaint, that plaintiff was an employee under Title VII because she did not receive either direct or indirect compensation in exchange for her work at the Association. Moreover, plaintiff's "work" did not consist of services rendered specifically for the Association; rather she did bar committee work for the benefit of the bar at large.

Plaintiff argues that she was an employee. Although plaintiff concedes that she did not receive wages (Am. Compl. ¶ 21), she alleges that she received membership benefits that amounted to indirect compensation sufficient to create an employee/employer relationship.

Specifically, plaintiff claims that options to purchase insurance and apply for a credit card, reimbursement for expenses incurred while working on the Association projects, group discounts for car rental and hotel accommodations, and opportunities to network with other lawyers amounted to indirect remuneration. (Am. Compl. ¶ ¶ 22-23, 28-29, 128, 378-79' {;/ Br/ 11-14). Accordingly, plaintiff asserts, she was an employee of the Association and is entitled to Title VII protection. I disagree.

Contrary to plaintiffs' assertions, the membership benefits do not amount to compensation. The benefits plaintiff identified are available to all Association members and were not offered to plaintiff in exchange for her work. (PL. Br. at 12). Moreover, the opportunity to network with others is merely an incident of plaintiff's association with other attorneys through the Association; such an opportunity is not a benefit that the Association offered as compensation. That plaintiff expected to receive job opportunities through her involvement with the Association does not transform her relationship with the Association into one of employee/employer. (Am. Compl. ¶ 22).

Even viewing the allegations in a light most favorable to plaintiff, plaintiff's volunteer work did not qualify her as an employee of the Association, and, accordingly, plaintiff fails to sufficiently plead an essential element of a Title VII violation. See O'Connor, 126 F.3d. at 115-16. Plaintiff's Title VII claims are dismissed.

B. NYHRL and CHRL Claims

1. Applicable Law

Section 297(9) of the NYHRL provides a cause of action

for unlawful discriminatory practices. N.Y. Exec. Law § 297(9). Unlike Title VII, the NYHRL is not restricted to employment relationships, and, instead, applies as well to unlawful discrimination in education, housing, and places of public accommodation. N.Y. Exec. Law § 291.

The Human Rights Law contains an "election of remedies" limitation that bars "a person who has filed a complaint . . . with any local commission on human rights" from filing a lawsuit for the same cause of action. Id.; Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000); Vails v. Police Dep't of the City of New York, 54 F. Supp. 2d 367, 375 (S.D.N.Y. 1999).

A statutory exception to the election of remedies doctrine provides that where the complaint filed with a local human rights commission is dismissed for administrative convenience, a person is not barred from filing a plenary lawsuit. N.Y. Exec. Law § 297 (9); Whidbee, 223 F.3d at 75; Pugh v. Mem'l Sloan Kettering Cancer Ctr., No. 97 Civ. 8594, 1998 WL 158764. at *2 (S.D.N.Y. April 6, 1998) (Dismissal for administrative convenience is a narrow category "limited to cases where the dismissal is . . . for the convenience of the agency."). The statute also provides an exception for a case where a complaint was filed by the EEOC with the Division pursuant to the Title VII requirement that all complaints filed directly with the EEOC be deferred to the Division. See N.Y. Exec. Law § 297 (9) (citing 42 U.S.C. § 2000e-5(c)). See also Morelli v. Cedel, No. 96 Civ. 2874, 1997 WL 61499, at *8 (S.D.N.Y. Feb. 13, 1997), vacated in part by 141 F.3d 39 (2d Cir. 1998); Bouker v. Cigna Corp., 847 F. Supp. 337, 339-40 n.6 (E.D. Pa. 1994).

The language of the CHRL is nearly identical to that of § 297 (9) and bars a person who has filed a complaint with either the city human rights agency or the Division from filing a plenary judicial action under the CHRL as well. N.Y.C. Admin.

Code § 8-502(a); see also McNulty v. New York City Dep't of Finance, 45 F. Supp. 2d 296, 303 (S.D.N.Y. 1999).

2. Application

Here, the election of remedies doctrine precludes plaintiff from filing suit for her NYHRL and CHRL claims because plaintiff elected to pursue her claims first through the Division. See N.Y. Exec. Law § 297 (9). Plaintiff filed her complaint with the Division, retained counsel, and participated in a ten-day hearing in front of an administrative law judge. (Am. Compl. ¶ ¶ 48-49, 52).

Plaintiff argues that she is not subject to the election of remedies doctrine because of the applicable statutory exceptions and because her constitutional rights have been violated. These arguments, however, are not persuasive.

Plaintiff asserts that two statutory exceptions to the election of remedies doctrine apply here. First, plaintiff claims that the Division's dismissal of certain allegations is theoretically similar to a dismissal for administrative convenience because the Division's refusal to allow plaintiff to amend her complaint to add allegations of employment discrimination had the same effect as if the Division had dismissed those claims for administrative convenience. (Pl. Br. At 22-23). See N.Y. Exec. Law § 297 (9) ("where the [human rights] division has dismissed [the] complaint on the grounds of administrative convenience, . . . [plaintiff] shall maintain all rights to bring suit as if no complaint had been filed with the division").

Plaintiff's attempt to invoke the administrative convenience exception is misplaced. The Division, in its

decision, stated that it would not consider plaintiff's allegations of employment discrimination because plaintiff had not raised those claims in her complaint. (See Pl. Ex. D, at 14). Moreover, the Division concluded that plaintiff was not an "employee" under governing law, and therefore plaintiff could not amend her complaint to raise employment law claims (Id.).

Plaintiff relies on Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251 (2d Cir. 1991). In Promisel, however, the "complaint with[the Division] was dismissed for administrative convenience." 943 F.2d at 253. Here, instead, the Division conducted a hearing and issued a decision on the merits finding that plaintiff was not discriminated against and that she was not an employee; the complaint was not dismissed for administrative convenience. (Pl. Ex. D). Accordingly, plaintiff is not exempt from the election of remedies doctrine under the administrative convenience exception.

Plaintiff seeks to invoke a second statutory exception to § 297 (9). This exception exempts a complaint that was filed by the EEOC to comply with the EEOC's obligations under Title VII. N.Y. Exec. Law § 297 (9). This provision of § 297 (9), however, does not apply here because plaintiff filed her complaint directly with the Division, not the EEOC.

Plaintiff also argues that she was denied her rights to due process and equal protection because she was not given the opportunity to properly litigate her issues before the Division. (Pl. Br. at 24-29). The argument is rejected. First, plaintiff raises these allegations only in her brief and in paragraph 1 of the amended complaint. Plaintiff does not include violations of constitutional rights among the 23 claims she asserts in the amended complaint. Second, to the extent plaintiff belatedly seeks to raise constitutional claims, the Association and the individual defendants are not state actors. See Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 924, 929 (2001). Third, the election of remedies doctrine bars

plaintiff from raising the NYHRL and CHRL claims in a plenary judicial action; plaintiff cannot challenge the Division's ruling in this lawsuit as her recourse is to seek judicial review by filing a petition for review in accordance with § 298 of the NYHRL, N.Y. Exec. Law § 298. Hence, defendants' motion to dismiss those claims is granted as well.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss all remaining claims in the amended complaint is granted. The amended complaint is hereby dismissed, with prejudice, for failure to state a claim upon which relief may be granted and because the NYHRL and CHRL claims are barred by the election of remedies doctrine. The Clerk of the Court shall enter judgment accordingly.

SO ORDERED.

Dated: New York, New York
July 9, 2001

s/_____
Denny Chin
United States District Judge

(3)

No. 02-667

Supreme Court U.S.
FILED
DEC 4 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 2001

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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BRIEF REGARDING SUBJECT MATTER JURISDICTION

Petitioner respectfully submits this supplemental brief pursuant to Supreme Court Rule 15 (8) and Federal Rule of Civil Procedure 12 (h) (3) to raise the defense of lack of subject matter jurisdiction.[1]

THE DECISION MUST BE REVERSED BECAUSE DHR DID NOT HAVE SUBJECT MATTER JURISDICTION TO RECEIVE THIS DEFERRAL FROM EEOC OR TO ACT AS A FEDERAL TRIAL COURT, AND NEW YORK STATE COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION TO RESOLVE FEDERAL QUESTIONS UNDER TITLE 7 ABOUT WHICH FEDERAL COURTS ARE DIVIDED

Lack of subject matter jurisdiction may be raised at any time during the proceedings and cannot be waived. *Fox v. State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994), *cert denied*, 515 US 1169, 115 S.Ct.2634 (1995);

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[1] Supreme Court Rule 15 (8) provides that a supplemental brief may be filed to present new matter. Fed. Rule Civ. Proc. 12 (h)(3) provides that the defense of subject matter jurisdiction may be raised at any time by parties or the court and cannot be waived. Petitioner has found no case regarding the procedure to be followed where subject matter jurisdiction is raised in a supplemental brief because of law discovered after filing the Petition for Certiorari. In the absence of precedent on point, petitioner relies upon the concurring opinion of Chief Justice Burger in *Fusari v. Steinberg*, 419 US 379, 391 (1975), also cited in *Board of Licensc Comm'rs of Tiverton v. Pastore*, 469 US 238, 250 (1985), that counsel have a continuing obligation to advise courts regarding their respective jurisdictions. *See also, Stern, et al, Supreme Court Practice* (8th Edition 2002) § 6.27 (factors affecting the reasons for granting certiorari other than new material can be presented in the form of a supplemental brief, citing Supreme Court Rules 15.6 and 8).

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Lytle v. Household Mfg., 494 US 545, 556n. 4 (1989); *Lambert v. Genesee Hospital*, 10 F.3d 46, 57-58 (2d Cir. 1993), *cert. denied*, 511 US 1052, 114 S. Ct. 1612 (1994). *See also, e.g., C. Wright and A. Miller, Federal Practice and Procedure §.* 1393 (1990); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *rehearing denied, cert. denied*, 449 US 953 (1980); *Athens Community Hospital, Inc. v. Schweiker*, 686 F.2d 989, 992 (D.C. Cir. 1982), modified in part on other grounds, 743 F.2d 1, *citing Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), *cert. denied*, 434 US 1086, 98 S. Ct. 1281 (1978); *Promisel v. First American Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir. 1991), *cert. denied*, 502 US 1060, 112 S. Ct. 939 (1992); *Halleran v. Hoffman*, 966 F.2d 45, 47 (1st Cir. 1992) (a party's objection to subject matter jurisdiction can be raised on appeal); accord, *Eisler v. Stritzler*, 535 F.2d 148, 151-52 (1st Cir. 1976). The defense of subject matter jurisdiction cannot be waived, and a court must consider it whenever it is raised. *See, e.g., Green v. Obergfell*, 121 F.2d 46, 54 (D.C. Cir.), *cert. denied*, 314 US 637 (1941); *Saverese v. Edrick Transfer and Storage, Inc.*, 513 F.2d 140 (9th Cir. 1975).

Lack of subject matter jurisdiction "is so fundamental a defect" that [FRCP 12(h)(3)] permits a court to recognize it at any time, even upon its own motion. *Bernstein v. Universal Pictures, Inc.* 517 F.2d 976 (2d Cir. 1975), on remand 79 FRD 59 (1975). Bernstein reversed dismissal of a complaint where factual issues as to whether a plaintiff had statutory employment status "was critical to determination of subject matter jurisdiction" under the National Labor Relations Act. *Id.* at 979-980.

Fed. Rule Civ. Proc. 12 (h) (3) directs that whenever a court lacks subject matter jurisdiction, it shall dismiss the action. In this case, that rule applies to DHR, because Title 7

(42 USC § 2000e-5 [c]) requires that where the State in which a claim arises has a law prohibiting the unlawful practice alleged and an agency authorized to grant or seek relief from that unlawful practice, EEOC must defer all Title 7 claims to that State agency for investigation and enforcement. *Id.* The federal-state work-sharing agreement that EEOC and New York have negotiated pursuant to § 2000e-5(c) permits DHR to hear and dispose of Title 7 claims. 29 CFR § 1601.13 *et seq.; see also Kremer v. Chemical Construction*, 456 US 461 (1982); *York v. Association et al.*, 286 F.3d 122 (2d Cir. 2002); *Ryan v. New York Tel. Co.*, 62 NY 2d 494, 499, 478 NYS2d 823, 825-26 (1984). Because EEOC permits New York to hear and make final disposition of Title 7 claims, EEOC has effectively deputized DHR as a federal trial court that is subject to the FRCP 12(h)(3) defense of lack of subject matter jurisdiction.

In order for a State to obtain subject matter jurisdiction over Title 7 claims from EEOC, the state employment discrimination law and the state administrative agency that administers that state law must satisfy §. 2000e-5(c) requirements for deferral. The § 2000e-5(c) qualifications for an EEOC deferral agency are: 1. the State must have a state law that makes unlawful discrimination based on race, color, religion, sex, national origin or disability; *and* 2. the State administrative agency must be empowered to grant or seek relief from the unlawful practice, or institute criminal proceedings. 29 CFR §.1601.70 (2002). Where a State does not satisfy both these Title 7 requirements for deferral, that State cannot assert jurisdiction over federal claims, because State agencies that lack the law or enforcement procedures required by federal law are not appropriate deferral agencies contemplated by Title 7. *See, e.g., Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F. Supp.1028 (9th Cir. 1970), *vacated on other grounds*, 400 US

1004 (1971), 91 S. Ct., 562 (1971); *Cunningham v. Litton Industries*, 413 F.2d 887, 891 (9th Cir. 1969).

A general state anti-discrimination law does not satisfy Title 7 deferral requirements where that law does not prohibit the specific unlawful acts alleged or protect the specific plaintiffs alleging them. 29 CFR §. 1601.13. For example, a State law that does not specifically prohibit sex discrimination complaints or cover non-profit organizations does not have subject matter jurisdiction over those classes of claims. *Id.* EEOC therefore cannot defer such claims to that State. *Id. See also, Leis v. Opportunity Consultants, Inc.*, 441 F. Supp. 1314 (SD Ohio 1977) (no protection for sex discrimination inferred from general discrimination statute); accord, *McDonald v. General Mills Inc.*, 387 F. Supp. 24, 34 (ED Cal 1974) and *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (D.C. Cal 1972).

An EEOC deferral state must also offer effective remedy for the specific unlawful acts alleged, and general enforcement authority is insufficient where it cannot remedy the specific unlawful practices alleged. *General Ins. Co. of America v. EEOC*, 491 F.2d 133, 135 (9th Cir. 1974); accord. *EEOC v. U.S. Fidelity and Guaranty Co.*, 420 F. Supp. 244, 253-555 (D.C. Md. 1976); *Int'l. Brotherhood of Electrical Workers v. General Electric Co.*, 4 CCH EPD § 7614 (DC Ohio 1971). For example, courts have declined to infer a remedy for retaliation from general anti-discrimination state laws. *See, e.g., Neuces County Hospital District v. EEOC*, 518 F.2d at 897 (5th Cir. 1975) and *Bauman v. Union Oil Co.*, 400 F. Supp. 1021, 1027 (ND Cal. 1975).

In this case, the New York Human Rights Law (N.Y. Exec. Law §§ 296 *et seq.*) does not meet Title 7 requirements for deferral by EEOC, because it does not protect workers from employment discrimination unless they receive a salary

or wages. *See, e.g., State Div. of Human Rights v. GTE Corp.*, 105 AD2d 1082, 487 NYS2d 234, 235 (4th Dept. 1985); *Gallagher v. Gallagher*, 130 F.Supp. 2d 359 (NDNY 2001); *Robins v. Max Mara USA Inc.*, 923 F.Supp 460, 471 (SDNY 1996). Federal courts interpreting Title 7 have endorsed non-wage financial benefits as Title 7 compensation. *See, e.g., Hishon v. King and Spalding*, 467 US 69 (1984); *Haavistola v. Community Fire Co. of Rising Sun*, 6 F 3d 211 (4th Cir.1993); and other circuit cases cited in Petition for Certiorari at 13-14. Further, since New York law does not protect unsalaried workers, DHR cannot offer a remedy to unsalaried workers because they are not protected by state law.

Because the HRL does not protect unsalaried Title 7 plaintiffs and DHR cannot offer any remedy to those plaintiffs, New York law does not satisfy Title 7 deferral requirements, and EEOC could not defer York's Title 7 claim to DHR[2]. 42 USC 2000e-5 and 29 CFR §. 1601.13 (a) (2) . HRL §.297 (2.a) directs that after a complaint is filed, DHR must determine its subject matter jurisdiction and, if it finds it lacks jurisdiction, dismiss those allegations of the complaint. DHR should have dismissed York's state and federal employment allegations for lack of jurisdiction, for the reasons discussed above. *Compare Kordich v. Povill*, 676 NYS2d 331 (3Dept. 1998)[3].

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2 York first tried to file her claims with EEOC but it told her to file DHR. *See.* Petition for Certiorari at 5 and 22. The proof that EEOC deferred her case is that it later gave her a right-to-sue letter *(Id)*, which it cannot do in New York unless it first defers a Title 7 claim to DHR. 42 USC §. 2000e-5 (c).

3 *Moodie v. Federal Reserve Bank*, 58 F.3d 879 (2d Cir. 1995) dismissed an HRL complaint for a §. 297 (9) election of remedies where DHR did not have jurisdiction over the *respondent* Federal Reserve. Moodie did not reach the precedent question whether the purported election of remedies was annulled where, as here, DHR lacked subject matter jurisdiction to grant *any* relief to petitioner because she is not in the class

New York State courts do not have subject matter jurisdiction to resolve the existing conflict among federal courts regarding Title 7 compensation and employment status. Pet. for Certiorari at 6-20. Title 7 and HRL employment discrimination claims are decided under "identical standards" by federal and state courts in New York. *Kremer v. Chemical Construction Corp.*, 456 US 461 (1982). Pet. for Certiorari at 25. But not until this Court decides if an unsalaried worker can be a Title 7 employee and resolves the existing conflict among the circuits regarding this primary federal question, would the federal and state courts in New York have a governing legal standard to determine the secondary question of DHR's subject matter jurisdiction under state law. Only this Court can resolve conflicts among federal circuit courts regarding interpretations of federal statutes. *See, e.g., Udall v. Tallman*, 380 US 1, 16 (1965); *Kolstad v. American Dental Assn.*, 527 US 526 (1999). *See also United Housing Foundation Inc. v. Forman*, 421 US 837, 845-860 (1974) (Court had to define "security" under Securities Act of 1933 to determine federal court jurisdiction); *Mortenson v. First Federal Saving and Loan Assn.*, 549 F.2d 884 (3d Cir. 1977) (need to define "restraint of trade" under Sherman Anti-Trust Act); *Bernstein v.*

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of workers protected by the statute. In this case, where jurisdiction over parties is not at issue, that precedent question Moodie did not decide is dispositive. Lack of subject matter must annul a purported election of remedies, because it cannot be argued that a complainant would "elect" a remedy from an agency that is not authorized to hear *any* complaints from the unprotected worker. If either EEOC or DHR was mistaken about their respective subject matter jurisdictions, petitioner cannot be penalized for that agency error. *Mitchell v. Mid-Continent Spring Co. of Kentucky*, 466 F.2d 24, 27 (6th Cir. 1972), vacated and remanded, *cert. denied* 410 US 928 (1972), *Parker v. General Telephone Co.*, 476 F.2d 595, 596 (9th Cir. 1973); *General Ins. Co v. EEOC*, 491 F.2d at 136, *Cunningham v. Litton*, 413 F.2d at 891, *Leis v. Opportunity Consultants Inc.*, 441 F. Supp at 1314.

Universal Pictures, 517 F.2d at 979-980 (determination of employment status "critical" to subject matter jurisdiction).

Petitioner told the district court that DHR did not have jurisdiction of this case because by refusing to hear her employment claims it violated the terms of its work-sharing agreement with EEOC, pursuant to which EEOC had deferred her case to DHR. See, Plaintiff's (District Court) Memorandum of Law in Opposition to Motion to Dismiss the Complaint at 21-22; Pet. for Certiorari at 24. Neither the District or Circuit Court responded to that defense. Both courts below refused to grant a hearing on the primary factual question of employment compensation that was required to determine the secondary issues of employment status and subject matter jurisdiction.

CONCLUSION

The decision should be reversed and a new hearing granted in federal court, because DHR did not have subject matter jurisdiction to receive the claims deferred to it by EEOC or to act as a federal trial court to consider those claims, and New York courts do not have subject matter jurisdiction to resolve federal questions under Title 7 about which federal courts are divided.

Dated: New York, New York

December 3 , 2002

Respectfully submitted,

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No. 02-667

IN THE

Supreme Court of the United States

October Term, 2001

ALEXANDRA YORK,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK;
CONRAD HARPER, a former Association President;
STEPHEN C. KASS, a former committee chair; and
JOHN FRENCH, a former committee chair,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

Appendix A
Supreme Court 15 (8) and Federal Rule of Civil Procedure 12 (h) (3)

APPENDIX A

Supreme Court Rule 15 (8)

Any party may file a supplemental brief at any time while a petition for certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter.

Federal Rule of Civil Procedure 12 (h) (3)

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.